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In The
Supreme Court of the United States

LONGVIEW INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

RANDALL COGGIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This amicus curiae brief is submitted on behalf of the Texas Association of School Boards Legal Assistance Fund[1] ("TASB LAF") in support of Longview Independent School District's ("Longview ISD" or "District") Petition for Writ of Certiorari. Petitioner Longview ISD and Respondent Randall Coggin ("Coggin") have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Texas Association of School Boards Legal Assistance Fund is an association of over 800 Texas public school districts. Established in 1980, the mission of TASB LAF is to provide amicus curiae briefs and other litigation support to member school districts involved in litigation of national and statewide importance. TASB LAF is governed by officers of the Texas Association of School Boards (an association of approximately 1,045 member public school districts), the Texas Association of School Administrators (an association of public school district superintendents and other school administrators), and the Texas Council of School Attorneys (an association of school law attorneys who together represent more than 90 percent of the public school districts in Texas).

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[1] This brief was authored by outside counsel for TASB LAF. No person or entity other than TASB LAF's members made a monetary contribution to this brief's preparation or submission. Although Petitioner Longview ISD is a member of TASB LAF, Petitioner has not made any direct financial contribution to this brief's preparation or submission.

TASB LAF is concerned that the Fifth Circuit has abandoned the long-settled requirements of pre-termination procedural due process. Further, it is concerned that the court's decision is based on faulty analysis of state law that far exceeds the scope of the issues raised and briefed by the parties. TASB LAF submits this brief as a friend of the Court to illustrate the ramifications of the Fifth Circuit's departure from this Court's established precedent.

Certiorari review is needed not only to correct the Fifth Circuit's erroneous analysis of the constitutional requirements of pre-termination due process, but also to clarify that a § 1983 claim for denial of procedural due process can be established only against the entity that denied the opportunity for a proper hearing. Intervention by this Court is necessary to prevent federal courts in the Fifth Circuit and beyond from applying the erroneous analysis of *Coggin v. Longview Independent School District*, 337 F.3d 459 (5th Cir. 2003) (en banc), in future lawsuits involving the termination of public employees.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's en banc majority opinion in this case misapplies well established procedural due process analysis and creates a dangerous and unwarranted precedent that places all public school districts – indeed all public employers – at risk of additional liability for terminating certain public employees. By creating a theory of "timing causation," whereby Longview ISD is deemed to have violated Coggin's Fourteenth Amendment rights by terminating him before his opportunity to seek state court judicial review had expired, the court has improperly reconfigured the constitutional standard for pre-deprivation due process. The timing causation analysis crafted by the

en banc majority represents a three-layered compound error: The basis for the Fifth Circuit's holding is 1) contrary to existing precedents governing pre-termination procedural due process, 2) based on legal theories not presented by the pleadings, record, and earlier rulings of the case, and 3) unsupported by Texas law. The en banc majority so far departs from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its supervisory power.

This case also presents the Court with the critical opportunity to clarify the nature of appropriate § 1983 causation analysis in multiple state actor scenarios such as that set out by the provisions of the Texas Education Code at issue in this case. In this age of heightened accountability for public schools, the Texas Legislature has sought to create a more streamlined system to resolve educator employment disputes quickly and fairly, in the interests of both public employer and public employee. This case is appropriate for review on writ of certiorari in order to vindicate the substantial public policy interests of school districts and other public employers nationwide in maintaining their ability to act with certainty in dismissing unsatisfactory employees when the public good so requires.

ARGUMENT

A. THE EN BANC MAJORITY OF THE FIFTH CIRCUIT COMMITTED COMPOUND ERRORS THAT YIELD A FLAWED PROCEDURAL DUE PROCESS ANALYSIS AND OVERREACHING APPELLATE REVIEW.

Having determined to rehear this case en banc following a split panel decision, the Fifth Circuit proceeded to analyze the nature of Randall Coggin's Fourteenth

Amendment procedural due process rights in a manner unsupported by the precedents of this Court. As set forth below, the resulting opinion of the narrow en banc majority is flawed by multiple, compounding layers of analytical error and judicial overreaching, the cumulative effect of which calls for this Court's exercise of its supervisory power.

1. The En Banc Majority's Analysis Upends the Well Established Balance Between Employer and Employee Interests in Pre-Termination Procedural Due Process.

The first layer of error by the en banc majority is that it completely alters the careful balance of competing interests that this Court has struck in its procedural due process jurisprudence. The modern analysis of how much process is due to an employee who is proposed for termination was set forth in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). In *Loudermill*, this Court weighed the competing interests presented in termination of a public employee, and developed a balanced, logical, and easily applicable standard. Unfortunately, the Fifth Circuit has taken this carefully developed, balanced standard and turned it on its head, tilting the scale totally in favor of the employee, and eliminating the consideration of the public employer's interests.

As discussed in *Loudermill*, a public employee with tenure or a currently effective contract has a vested property interest in retaining employment. *Id.* at 542. Certainly the burdens and risks of unemployment are an important consideration, and due process acts as a means to ensure that an employee is exposed to those risks only when appropriate. These considerations led to the primary holding of the case, which is that the employee is entitled

to pre-termination notice of the charges, and a meaningful *opportunity* to respond to those charges.[2] This gives the employee an opportunity to point out factual disputes, to present countervailing arguments, and to identify issues that may indicate the public employer has made a mistake. *Id.* at 546.

The *Loudermill* majority also weighed the public employer's interest in immediate termination. The Court concluded that a minimal pre-termination procedure "would impose neither a significant administrative burden nor intolerable delays." *Id.* at 544. The due process requirements of notice and an opportunity to be heard will not result in "significant administrative burden" or "intolerable delays" because this Court limited the type or amount of process due. The pre-termination hearing does not have to be "elaborate." *Id.* at 545. Something less than a "full evidentiary hearing" is all that is required by the U.S. Constitution. This pre-termination hearing does not have to be designed to "definitively resolve the propriety of the discharge," but should merely serve as an "initial check against mistaken decisions." *Id.* Based on these limitations on the nature of pre-termination due process requirements, this Court correctly concluded that "[t]o require more than this prior to termination would intrude

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[2] Well established precedent permits the state to erect reasonable procedural requirements for triggering the right to an adjudicatory due process hearing. These requirements can take the form of statutes of limitation or filing fees. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 439 (1982); *Boddie v. Connecticut*, 401 U.S. 371 (1971). Indeed, *Logan* notes that the state affords all the process that is due "when it terminates a claim for failure to comply with a reasonable procedural rule. . . . " *Logan*, 455 U.S. at 439. Thus, an employee can effectively waive the right to a pre-deprivation hearing by failing to comply with the State's procedural rules for triggering a hearing, such as occurred in the case at bar.

to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 546.

In the case *sub judice*, the en banc majority takes these simple rules through the looking glass and develops a topsy-turvy analysis that confuses and entwines state law procedural requirements with the requirements of the U.S. Constitution. It eradicates any consideration for the interest of the public employer. Significantly, the en banc majority holds that the school board acted prematurely and therefore cut off Coggin's opportunity to seek judicial review of the Commissioner of Education's ("Commissioner") determination that no hearing examiner would be appointed. Pet'r App. 9.[3] By requiring Longview ISD to wait an additional 30 days to take final action on Coggin's employment, the court turns the pre-termination process into more than an initial check against erroneous decisions as required by *Loudermill*. This expanded timeframe fails utterly to recognize the District's interest in taking prompt, decisive employment actions.

Although it may seem at first blush that this newly imposed 30-day waiting period would not significantly alter the balance between the competing interests of the public employer and the public employee, closer analysis of the Fifth Circuit majority's final effort at resolving this case reveals a much more onerous burden on the employer. In particular, the en banc majority does nothing to limit the District's "waiting period" to 30 days. Under Texas' statutory scheme, as in other state jurisdictions, judicial review of a final decision of a state agency may take

[3] All citations herein to the district court and Fifth Circuit opinions in this case reference the relevant pages of Petitioner Longview ISD's Appendix.

months or years. Texas law allows an appeal as of right to the intermediate Court of Appeals, and allows for discretionary review by the Texas Supreme Court.

The en banc majority does not take these potential subsequent appeals into account; it merely states that Longview ISD should have waited until the end of the 30-day period in which the majority concluded Coggin could seek judicial review of the Commissioner's determination. Left unresolved is this: What options would have existed for Longview ISD if Coggin had filed such a legal challenge? Is the District obligated to wait until a final decision is reached by the courts? At what stage of the judicial review of the agency's action is the District free to begin termination proceedings? It is possible that if Coggin had filed an appeal within the timeframe allowed by the Texas Administrative Procedure Act ("Texas APA"), a final determination on the propriety of the Commissioner's determination might not be made for years. Is the District obligated to keep Coggin employed for the duration of this process?

This potential for indefinite waiting on the final resolution of judicial review *does* represent a "significant administrative burden" and an "intolerable delay." To force a public employer to wait to terminate an unsatisfactory employee until all judicial challenges have been resolved is an unwarranted intrusion on the government's interest. Because the en banc Fifth Circuit adopts this new and potentially debilitating standard for procedural due process, this Court should grant Longview ISD's Petition for Writ of Certiorari and restore *Loudermill*'s balance and logic to the pre-termination due process analysis for public employees.

2. The En Banc Majority Improperly Decided the Case on Grounds Not Raised Below and Therefore Denied the District the Opportunity to Defend the Case.

Underlying the en banc majority's unprecedented reconfiguration of the *Loudermill* standard for pre-termination due process is its second layer of error – basing its new due process causation analysis on a legal theory that was never raised in this case. The panel in this case concluded that the District's *inaction* – that is, the fact that it failed to re-notice its proposed termination of Coggin or to conduct its own evidentiary hearing – was the "moving force" in the violation of Coggin's procedural due process rights. Pet'r App. 65-67. However, the en banc majority's analysis is entirely different, developing for Coggin a theory of timing causation under which the District's action to terminate Coggin was the "sole cause" of the violation, because its swift action allegedly denied Coggin his right to state court judicial review under Texas Education Code § 7.057(d) (Vernon Supp. 2004). Pet'r App. 9.

It is undisputed that Coggin himself never invoked section 7.057 and never argued that his procedural due process rights were violated because Longview ISD effectively denied his right to appeal under this provision. In fact, the district court expressly noted that it did not consider this statutory provision, because it had not been raised by the parties. Pet'r App. 103 & n. 14. Nor did any party, in its briefing to the Fifth Circuit, refer to or rely on this statute in any manner adequate to argue its relevance to this case. Pet'r App. 20 & nn. 39, 40 (Jones, J., dissenting). Because the right to, and the statutory basis for, state court judicial review were not argued before the district court or the panel, no party had invoked the Texas APA to derive a timeframe for such review. Nor had any party

advanced any argument regarding whether and how such a right of judicial review would impact Longview ISD's ability to proceed to act on Coggin's proposed termination.

As the six dissenters point out, in a series of three opinions, the en banc majority's approach is contrary to well established principles of appellate review, recognized by this Court and by the Fifth and other Circuits. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *United States v. Brace*, 145 F.3d 247, 255-56, 261 (5th Cir. 1998). As these precedents make clear, review of an issue or theory not raised by the parties in the district court not only renders meaningless the adversary process, but it denies the other parties an opportunity to present evidence or legal argument tailored to the issues to be decided.

Here, the en banc majority, without explanation, has departed from this precedent, thus creating a new legal theory for Coggin and denying Longview ISD any opportunity to have defended its case on these issues. There is not even an attempt to bring this departure within the limited "extraordinary circumstances" exception to the rule. *See Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999); *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir. 1996). Indeed, the majority addresses Judge Jones' dissent[4] with only the thin thread that the ultimate issue in the case was which

[4] While the en banc majority refers only to the dissent authored by Judge Jones, *see* Pet'r App. 19 (Jones, J., dissenting), Judge Garza's dissent also criticizes this fundamental flaw in the majority's analysis. Pet'r App. 27 (Garza, J., dissenting). Judge Jolly's dissent, while emphasizing the utter speculation of the majority regarding the effect of the District's termination decision on Coggin's right to judicial review, also notes the majority's wholly new theory of the case. *See* Pet'r App. 15 (Jolly, J., dissenting).

state actor had caused the violation of Coggin's procedural due process rights, and therefore that it was simply exercising its duty "'to enunciate the law on the record facts.'" Pet'r App. 14-15 n. 35. Under this suggested standard, however, the rule of *Singleton*, *Brace* and similar cases is completely eviscerated; in order to justify deciding a case on a wholly different issue or theory never raised before the lower courts, an appellate court need only point to some topical connection between its newfound theory and the ultimate issues of the case.

The result of the Fifth Circuit's overreaching is that Longview ISD was effectively denied any notice that its actions were being challenged on a causation theory based on the effect of the timing of its decision, vis-a-vis Coggin's ability to seek judicial review. Had the District been made aware of this theory, it would have had the opportunity to develop its case differently, in a manner designed to limit the nature and the extent of any remedies to which Coggin might be entitled if any violation were found. The en banc majority improperly based its holding on a legal theory not developed by the parties or decided by the district court or the panel in this case. This error, exacerbated by the court's analytical errors regarding pre-termination procedural due process analysis and Texas law, leaves a dangerous precedent from an en banc court of appeals, and therefore calls for review.

3. The En Banc Majority's Incorrect Speculation Regarding the Applicability and Operation of State Law Cannot Support Its Assumption that Coggin's Right to Judicial Review Was Mooted or Prematurely Cut Off by Longview ISD's Action.

Finally, the en banc majority's third layer of error – its unsupported misapplication of state law – further infects

its analysis and produces a conclusion that calls for granting the District's Petition for Writ of Certiorari. Assuming arguendo that Coggin was entitled, pursuant to Texas Education Code § 7.057(d), to judicial review of the Commissioner's decision not to appoint a hearing examiner to hear his case, the en banc majority's new theory of timing causation is not properly grounded in the Texas APA or otherwise supported by state law. Moreover, the en banc majority has offered no analysis to support its conclusory assumption that Longview ISD's termination of Coggin somehow precluded his ability to seek that judicial review in a proper forum.

Neither Texas' Education Code in particular, nor its administrative laws more generally, support the majority's borrowing, for purposes of section 7.057(d), the 30-day timeframe within which an aggrieved party may seek judicial review of a final decision of a state agency in a contested case. *See* TEX. GOV'T CODE ANN. §§ 2001.171, 2001.176 (Vernon 2000). The portions of the Education Code outlining the process due in mid-year educator terminations expressly provide that the Texas APA does not apply to these administrative proceedings. *See* TEX. EDUC. CODE ANN. § 21.256(b) (Vernon 1996) (governing the initial hearing conducted by an independent examiner, if timely requested); *id.* § 21.301(e) (Vernon Supp. 2004) (governing an appeal to the Commissioner of a school board's decision under § 21.259); *Moses v. Dallas Indep. Sch. Dist.*, 12 S.W.3d 168, 171 (Tex. App. – Dallas 2000, no pet.).

While the en banc majority is content to assume that the Texas APA's general 30-day time limit applies in this context, its sparse two-footnote analysis does not support this assumption. Pet'r App. 8-9 & nn. 20, 21. Its reliance on case law emphasizing that, even outside the scope of the APA, an aggrieved party must seek judicial review within a reasonable time does not inform the issue in this case,

namely whether Longview ISD was precluded from terminating Coggin's employment until he had had a "reasonable" time to appeal the Commissioner's denial of hearing.

More importantly, even assuming that the Texas APA does apply and therefore that Coggin had 30 days within which to appeal the Commissioner's denial of his hearing request, the en banc majority offers nothing to support the conclusion compelled by its new theory of timing causation, that the Longview ISD's decision to terminate Coggin prior to the expiration of that 30 days somehow cut off or mooted his opportunity for judicial review in state court.[5] The critical fact of this case is that Coggin *never* filed such a petition for judicial review, under the Texas APA or otherwise. If he had, he may have been able to obtain injunctive relief ordering that the Commissioner assign a hearing examiner so that his case could be considered in accordance with the procedures outlined in Texas Education Code Chapter 21, and he may have been able to obtain injunctive relief ordering the District to stay its termination decision pending those proceedings. *See* Pet'r App. 16-18 (Jolly, J., dissenting). The en banc majority's speculation, under its newly created theory of timing causation, that Coggin was denied judicial review because of the District's decision is lacking any support as a matter of law.

Unfortunately, the Fifth Circuit's en banc majority affirmed the lower court in this case for reasons 1)

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[5] Under the Texas APA provision on which the en banc majority relies, unless otherwise provided by statute (and no such other statute is suggested here), a person seeking judicial review in a contested case must file his petition in a Travis County district court. *See* TEX. GOV'T CODE ANN. § 2001.176(b)(1) (Vernon 2000).

contrary to existing precedents governing pre-termination procedural due process, 2) based on legal theories not presented by the pleadings, record, and earlier rulings of the case, and 3) unsupported by Texas law. As it stands, the Fifth Circuit's majority opinion is erroneous as a matter of law for all of these reasons, any one of which would be grounds for reversal. The aggregate effect of the en banc majority's compound errors so far departs from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its supervisory power. For this reason, this Court should grant Longview ISD's Petition for Writ of Certiorari.

B. THE EN BANC MAJORITY'S CAUSATION ANALYSIS HOLDS LIABLE THE WRONG STATE ACTOR.

Not only does the en banc majority's analysis call for the Court to correct the three compound errors outlined above, this case also presents an opportunity for the Court to correct and clarify the en banc majority's § 1983 causation analysis, which is the pivotal constitutional issue in this case. The Court should accept this case to clarify that a § 1983 claim based on the denial of procedural due process can be established only against the particular state actor that is responsible for and actually denies the proper opportunity to be heard.

The district court, the panel majority, and the en banc majority each concluded that § 1983 liability could lie against Longview ISD because the District, as Coggin's employer, was the entity responsible under the Texas Education Code for making the final decision concerning Coggin's termination. All three courts concluded that the

District's discharge of Coggin, despite knowing that he had not received any kind of hearing, was the cause of Coggin's constitutional deprivation. The courts' causation analysis, however, overlooked two important matters.

First, the courts incorrectly based their analysis on who deprived Coggin of his property interest in employment rather than on who deprived Coggin of his right to procedural due process. This distinction is critical in the case at bar. In Texas, as perhaps in other states and in other employment contexts, state law divides the responsibility for educator termination between two state actors who have mandatory and exclusive duties: the Governor's appointed Commissioner of Education and the locally elected school board. The Commissioner is responsible exclusively, upon an educator's timely request, for appointing an examiner to conduct a pre-termination hearing.[6] In turn, the school board is responsible for making the final decision with respect to the educator's continued employment, based only on the findings and recommendations of the appointed hearing examiner.[7]

In none of the cases relied upon by the en banc majority[8] or the panel majority[9] was this type of two-actor,

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[6] TEX. EDUC. CODE ANN. § 21.254 (Vernon Supp. 2004).

[7] TEX. EDUC. CODE ANN. §§ 21.258, 21.259 (Vernon 1996).

[8] *McMillan v. Monroe County, Ala.*, 520 U.S. 781 (1997) (petitioner convicted after county sheriff concealed exculpatory evidence from criminal trial); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (high school football coach alleged that racial discrimination motivated his campus reassignment); *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425 (1997) (professor alleged breach of contract claim against university for its failure to hire him).

[9] *Board of County Comm'rs v. Brown*, 520 U.S. 397 (1997) (private citizen arrested by county police officer who used excessive force); *Owen v. City of Independence*, 445 U.S. 622 (1980) (chief of police discharged

(Continued on following page)

two-part, pre-termination process at issue. Consequently, neither the holdings nor the causation analysis therein squarely fit the present case. Indeed, in no case found has this Court been required to undertake a § 1983 causation analysis where state law separates employee termination duties between two or more state actors.

This Court's procedural due process analysis in *Zinermon v. Burch*, 494 U.S. 113 (1990), comes close, but does not fully treat the issue. The Court explains that a state actor's deprivation of a constitutionally protected property or liberty interest is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without adequate process. *Id.* at 125. The Court goes on to state that a constitutional deprivation of a protected interest is not complete when the deprivation occurs; it is not complete unless and until the state actor fails to provide due process. *Id.* at 126.

The *Zinermon* discussion lays the foundation for a rule that the denial of procedural due process, indeed the necessary "direct causal link"[10] can be established only against the entity that is responsible for and actually denies the proper opportunity to be heard, but the Court's holding in that case is limited. Because *Zinermon* involved one state actor, a state mental hospital (and certain employees of the mental hospital) that admitted a mental patient in accordance with Florida state law, the case does

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by the city council pursuant to certain provisions of the city charter); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (concert promoter's entertainment license revoked by the city council pursuant to local practices); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (person's office forcibly entered by deputy sheriffs who had been directed to enter the establishment by the county prosecutor).

[10] *See City of Canton v. Harris*, 489 U.S. 378, 385 (1989).

not fully contemplate the nature of the present case or of any other multiple state actor fact scenario. Review by this Court is therefore necessary to provide guidance on this critical causation issue.

The second important matter overlooked by the Fifth Circuit is that the en banc majority makes one state actor – Longview ISD – responsible for the action of another – the Commissioner, which is contrary to the long-settled principle of constitutional liability that governmental entities are liable only for their own illegal acts, and are not obliged to control the conduct of others. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79 (1986) (citing *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 692 (1978)). The en banc majority, like the panel majority and the district court before it, concluded that the Commissioner erred in his analysis of whether Coggin timely filed his request for a hearing examiner. Ironically, even though the Commissioner was found to be in error, he is no longer a party in this litigation and is therefore unaffected by the rulings and judgments handed down.[11]

The en banc majority imputed the Commissioner's alleged error to Longview ISD and made the District ultimately responsible for the decision of the Commissioner not to appoint a hearing examiner. However, to obtain a pre-termination hearing in Texas, "a teacher must

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[11] Pet'r App. 95. Coggin voluntarily dismissed his claims against the Commissioner and the Texas Education Agency after those parties asserted an Eleventh Amendment immunity defense and the district court indicated in a management conference that it thought the defense was valid. It is the understanding of TASB LAF that, to date, the Commissioner has not changed his practice of requiring all requests for the appointment of a hearing examiner to be received, not mailed, by the 15-day filing deadline established in Texas Education Code § 21.253.

file a written request . . . with the commissioner," not with his school district employer. TEX. EDUC. CODE ANN. § 21.253 (Vernon Supp. 2004). Consequently, the Commissioner is the only individual who can determine the timeliness of the request. It is fundamentally unjust to find the District culpable for the aspect of the two-actor, two-part, pre-termination process over which it has no responsibility or control. To do so, as set out in *Pembaur* and *Monell*, is unconstitutional.

In sum, review by this Court presents an important opportunity for the full treatment of § 1983 causation analysis when multiple state actors are involved and for the reiteration of the long standing principle that one governmental entity cannot be held responsible for the acts of another.

C. THE EN BANC MAJORITY'S ANALYSIS HAS FAR-REACHING, NEGATIVE IMPLICATIONS FOR PUBLIC EMPLOYERS.

Finally, the Fifth Circuit's en banc majority decision has far-reaching implications. First, by holding that Longview ISD was required to permit Coggin to undertake judicial review of the Commissioner's decision before the school board could take final action on his employment contract, the en banc decision adds another layer of pre-termination procedural due process. The additional requirement to await judicial review is not integral to the applicable statutory scheme for Texas educator termination and therefore eliminates all certainty concerning the proper procedural steps. As recognized by dissenting Judge Edith Jones, this case is of far-reaching significance for Texas educators. "Texas's scheme for teacher discipline and terminations . . . was carefully crafted to enhance teachers' rights while ensuring a fast decisional track." Pet'r App. 26. Despite the

Texas Legislature's effort in 1995 to streamline the teacher termination process to a maximum of 90 days, the en banc majority's decision here creates the potential for prolonged, indefinite limbo preventing final decisions by school boards.

Second, the court's holding, as a decision of an en banc court of appeals, provides weighty authority for public employees across this nation to argue that local or state level decisions concerning missed deadlines and noncompliance with procedural prerequisites are not determinative of whether an employee receives a pre-termination hearing. In effect, the court's majority decision opens the door for public employees to tie the hands of public employers, preventing them from taking decisive action if and when a public employee appeals any decision concerning the employee's compliance with statutory prerequisites. The potential for indefinite limbo is an unwarranted intrusion on the government's interest and, as discussed previously, destroys the careful balance struck by this Court in *Loudermill* between the interests of public employees and public employers.

The negative implications of the en banc majority's holding are particularly problematic in today's climate in public education, where the stakes for teacher and student performance have never been higher. Federal and state laws rightly demand highly qualified teachers and steady, adequate academic progress by public school students.[12]

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[12] In 2001, Congress passed the No Child Left Behind Act ("NCLB"), which reauthorizes the Elementary and Secondary Education Act of 1965 ("ESEA"). 20 U.S.C. § 6301 *et seq.* (2003). Primarily, the NCLB conditions the receipt of federal funds on compliance with set standards for student assessment, school accountability, and school improvement. NCLB requires student academic assessments to be

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School boards, school administrators, and teachers serving in this high stakes environment are continually making critical evaluations and decisions about the work performance of subordinates and peers. All stakeholders – administrators, educators, and students alike – deserve a straightforward and decisive resolution of employment disputes. This is especially true in circumstances such as in the case at bar where a school employee is alleged to have engaged in serious employee misconduct involving the mismanagement of public funds and the sexual harassment of co-workers.

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administered in certain school years and certain grades that measure student proficiency in math, reading, science, and language arts. States must separately measure the performance of economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency. Every student group must demonstrate adequate yearly progress on the assessments. Additionally, NCLB requires states to ensure that all teachers are highly qualified. Generally, a highly qualified teacher is one who has obtained full state certification, holds at least a bachelor's degree, and has demonstrated competence in the subject he teaches.

Many states impose academic standards separate from the requirements of NCLB. In Texas, for example, public high school students are required to perform satisfactorily on exit-level assessments before receiving a high school diploma. TEX. EDUC. CODE ANN. § 39.025 (Vernon Supp. 2004). Third, fifth and eighth graders must pass reading and/or math assessments before being promoted to the next academic grade. TEX. EDUC. CODE ANN. § 28.0211 (Vernon Supp. 2004). Further, public school districts and individual campuses receive annual performance ratings based on a school's performance across various academic excellence indicators (*e.g.*, student performance on assessment instruments, student dropout rates, student attendance rates, and others). TEX. EDUC. CODE ANN. § 39.072 (Vernon Supp. 2004). If a Texas campus and/or school district consistently performs poorly, then sanctions up to and including the replacement of campus and/or district leadership can be imposed by the Commissioner of Education. TEX. EDUC. CODE ANN. § 39.131 (Vernon Supp. 2004).

Rather than reinforce the straightforward Texas statutory scheme and the balancing principles established in *Loudermill*, the Fifth Circuit's majority opinion unnecessarily complicates pre-termination process. The opinion sets up the strong possibility for protracted and hotly contested employment litigation, all of which would need to be resolved before the provision of any sort of pre-deprivation hearing. Neither public school resources nor the resources of private individuals should be diverted for such disputes, particularly when the statutory scheme for mid-year educator terminations has not been challenged and the well established constitutional minimums for due process have been satisfied.

IV. CONCLUSION

For the foregoing reasons, TASB LAF respectfully requests that the Court exercise its supervisory power to grant Longview ISD's Petition for Writ of Certiorari. By granting the writ, the Court may correct the en banc majority's three-layered compound error arising from its newfound analysis of timing causation and clarify the appropriate § 1983 causation analysis to be applied when multiple state actors have mandatory and exclusive responsibilities related to the continued employment of public employees.

Respectfully submitted,

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